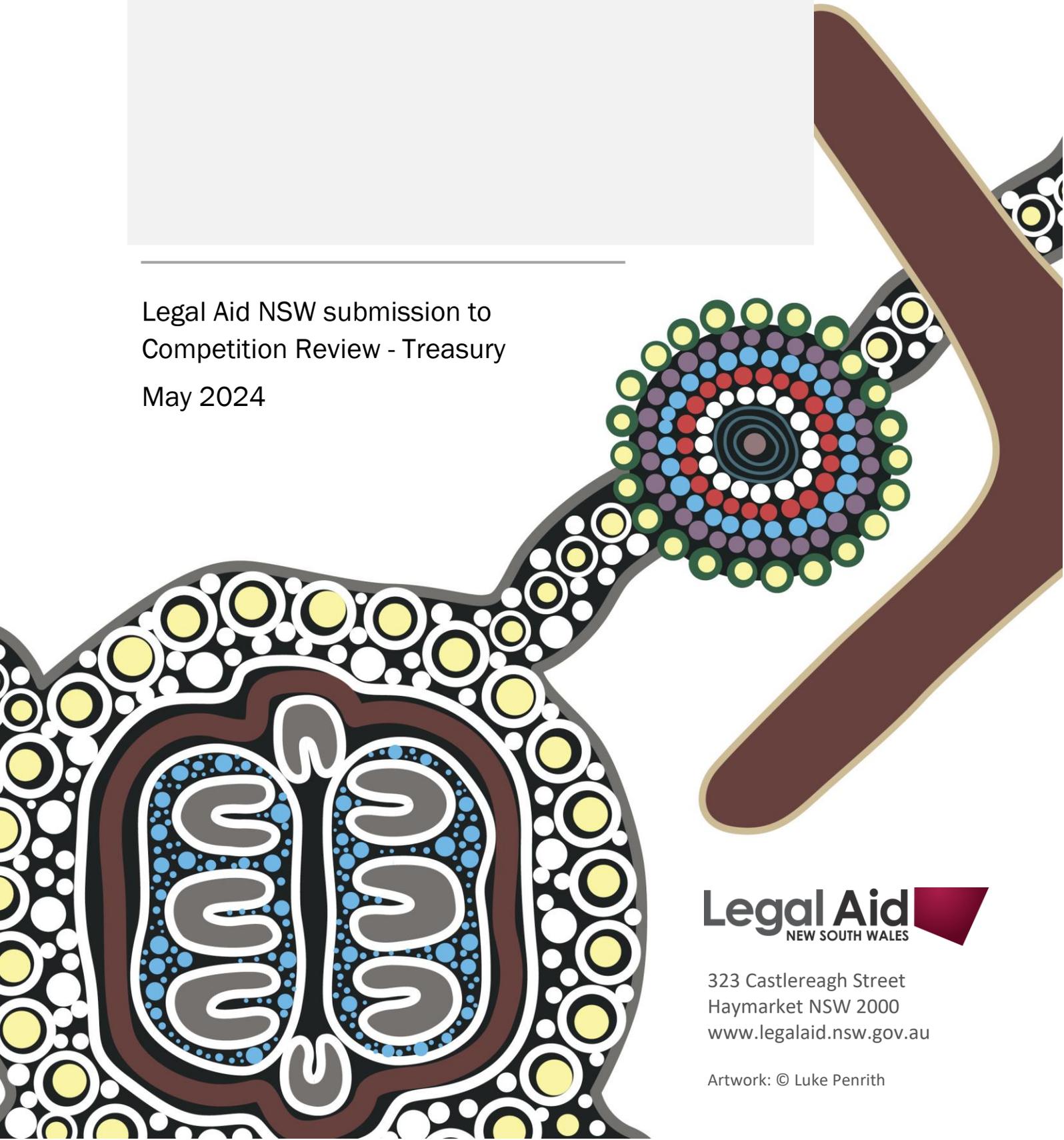


Worker non-competes and other restraints

Legal Aid NSW submission to
Competition Review - Treasury
May 2024



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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six

specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners, older people experiencing elder abuse and people impacted by disasters.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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2. Introduction

Employment law is consistently in the top three areas of civil law advice with Legal Aid NSW providing 2548 advice services in 22/23, 2267 in 22/21 and 2965 in 21/20. The most common areas of employment legal help are about unfair dismissal, underpayment of wages and general protections claims.

The specialist Employment Law Team in Legal Aid NSW's Civil Law Division undertakes advice and case work for priority clients and provides training and support to generalist civil lawyers about employment law. We use our practice experience, advising and representing some of the most disadvantaged workers in NSW, as a foundation for our law reform work and systemic advocacy.

While acknowledging the policy behind restraint of trade clauses in employment contracts, Legal Aid NSW is concerned about the increasing prevalence of these clauses and their impact on disadvantaged and low-income workers. In our experience these clauses are increasingly widespread and not limited to particular industries or occupation types. We routinely advise our clients that the clauses in their contracts are likely to be unenforceable. However, in our experience, workers are intimidated when faced with the risk of having to defend themselves in costly litigation and are more likely to adhere to the terms of a restraint. This intimidation is compounded for workers who have fewer employment choices, lower capability and less access to legal knowledge.

Legal Aid NSW welcomes the Competition Review's investigation into non-compete clauses and the opportunity to provide a submission based on the experiences of our clients.

Recommendation 1: Implement a national uniform law that bans the use of non-compete clauses in Australia.

Recommendation 2: Any policy response should apply to all employees and extend to independent contractors and 'employee-like' workers.

Recommendation 3: Implement civil penalties to deter employers from using unenforceable restraints.

Recommendation 4: Require employers to inform workers in writing when a non-compete is unenforceable.

Recommendation 5: Ban the use of client non-solicitation clauses for low-income workers and insecure workers.

Recommendation 6: Ensure any policy response has regard to the prevalence of client non-solicitation clauses in the care sector and the detrimental effect of such clauses on NDIS participants and their quality of care.

Recommendation 7: Introduce a national uniform law banning the use of co-worker non-solicitation clauses. In the alternative, prohibit their use for low-income and insecure workers.

Recommendation 8: Implement a complete ban on the use of restraint of trade clauses for insecure workers including casual workers, gig workers, and other workers engaged in employee-like work.

3. Current State: Restraint of Trade

3.1 Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?

Legal Aid NSW considers that the common law restraint of trade doctrine prioritises the interests of businesses over workers and the wider community, and that a policy response is needed to address the inherent unfairness in the existing law and practice with respect to the use of non-competes. Our concerns are broadly divided into four categories:

3.1.1 Employer Interests Prioritised

The starting point for the common law doctrine is that a restraint is invalid on the basis it is contrary to the public interest, unless the employer seeking to rely on the restraint can establish that it is reasonably necessary to protect a legitimate business interest.¹

In theory, the doctrine should strike a balance between three values that are often in tension in the context of employment: the interests of businesses in protecting against being undercut by their rivals; an individual's right to 'use and exploit for the purpose of earning a living all the skills, knowledge and experience they have acquired during their education and working lives';² and the broader public's interest in the economic development that is considered more likely to occur if everyone in society can participate to the fullest extent in the economy.³

However, there has been judicial and academic criticism that the doctrine has developed to focus on employers' interests with little consideration given to the interests of workers, or the relative bargaining power between the parties. As Dr Ian Ross states, 'the common law's primary concern is to assess whether the employer has a legitimate interest and to determine if the non-compete is commensurate with the interest. The employee's position is generally treated as irrelevant, and consequently the majority of non-competes are upheld.'⁴

¹ *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

² Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 156.

³ Christopher McMahon and Alan Eustace, 'Nothing to Lose to Lose but Their Restraints of Trade: Lessons for Employment Non-Compete Clauses from EU Competition Law' (2023) 52(2) *Industrial Law Journal* 2.

⁴ Ian Ross, 'Non-compete Clauses in Employment Contracts: The Case for Regulatory Response' (Working Paper No 4/2024, Tax and Transfer Policy Institute Working Paper, Australian National University, March 2024) 2.

Further, as Andrew Stewart notes, ‘it is rare for a court to concern itself in any detail with the relative bargaining power of the parties; or with the overall ‘fairness’ of the agreement; nor is it necessary that the employee receive any additional consideration for entering into the restraint.’⁵

The doctrine should also be considered within the broader context of Australian contract law which has developed a focus on the primacy of the contract without consideration of the relative bargaining power of the parties. Recent High Court Judgments⁶ have had seismic impacts in the employment law context given the High Court’s clear intent to focus on construing the contractual terms and avoiding an inquiry into the bargaining power of the parties to the dispute. The current Federal Government has recently introduced legislation to undo the impact of these decisions.⁷

Given the doctrine’s limited consideration of the interests of workers and the relative bargaining power of the parties, we consider that reform is necessary to address this emerging trend which is clearly not in the public interest.

3.1.2 Non-competes are Widespread

The use of non-competes by Australian businesses has increased over the last five years with nearly 1 in 5 Australian workers currently covered by a non-compete.⁸ A 2023 ABS survey revealed that 46.9% of Australian businesses reported using at least one type of restraint clause in their employment contracts, with non-competes used across all industries and somewhat indiscriminately across occupation types.⁹ Overall, the data indicates there is an increasing tendency to use non-competes, and absent a policy response, this trend is likely to continue.¹⁰

Non-compete clauses are no longer confined to senior level executives but are instead used across all industries and occupation types, including for low-income workers. It is our experience that non-competes are commonplace in employment contracts for workers earning less than \$80,000¹¹ and affect all occupation types including, among

⁵ Andrew Stewart ‘Drafting and Enforcing Post-Employment Restraints’ 1997 10 *Australian Journal of Labour Law* 184.

⁶ *WorkPac Pty Ltd v Rossato* [2021] HCA 23, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

⁷ *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

⁸ Dan Andrews and Bjorn Jarvis, ‘The Ghosts of Employers Past: How Prevalent are Not-compete Clauses in Australia?’ (2023) e61 *Institute*.

⁹ *Restraint Clauses, Australia 2023*, Australian Bureau of Statistics, Cat. No. 6306.0.

¹⁰ Ross (n 4) 1.

¹¹ Noting that \$80,000 is the current annual salary threshold to receive advice from a Legal Aid NSW lawyer about an employment law issue.

other examples, disability and aged care workers, yoga instructors, early childcare workers, and hairdressers.

Case Study – Manager of a laundromat in a small regional town

Our client was employed as a laundromat manager in a small regional town under an oral contract. Our client was made redundant and was given a letter by her former employer entitled "Confirmation of Redundancy". The letter referred to our client's "implied employment obligation" and stated that our client was subject to a non-solicitation restraint. The letter stated that the implied restraint prohibited our client from soliciting, canvassing, approaching, or accepting any approaches from clients of her former employer for a period of 12 months. No restraint area was specified. The letter stated that her former employer may take steps to enforce the obligation if her former employer were to become aware of any breach.

Our client sought legal advice as the "implied employment obligation" had never been discussed with her during her employment. Our client was concerned that the restraint would affect her prospects of employment as she intended to work in the same industry within her town.

Case Study – Casual Brow and Lash Technician

Our client, a young single parent, was employed as a casual brow specialist and lash technician in a brow and eyelash boutique pursuant to a written employment contract and was covered by the Hair and Beauty Industry Award. Our client was paid a base rate of \$28.58 per hour with penalty rates applying on weekends and public holidays.

Our client's employment contract contained a cascading non-compete clause and a cascading non-solicitation clause preventing our client from engaging with a competing business or soliciting former clients:

- At a maximum, within 30 kilometres of any of the 10 locations in NSW and QLD owned by her previous employer for 6 months; and
- At a minimum, within 15 kilometres of any of the 10 locations in NSW and QLD owned by her previous employer for 3 months.

During her employment, our client established her own at-home lash and brow business. When our client's employer became aware of our client's at-home business, our client was called into a disciplinary meeting where our client's employer reminded her of the restraint of trade clause in her employment contract. Our client received a letter from her employer requiring her to cease operating her business.

Our client subsequently resigned and sought legal advice about whether legal action would be taken against her. Our client stated while she had not contacted any former clients, some former clients had found her independently.

Non-competes are also no longer confined to individual employment contracts. They can now be found in independent contractor agreements for low-paid gig workers, in enterprise agreements which cover large cohorts of workers,¹² and they have become a common feature in settlement agreements or exit agreements. In our experience, this includes:

- Employers restating or extending a restraint from the contract in a settlement agreement upon the resolution of a dispute. In some cases, this includes extending the scope of the restraint for a longer duration and commencing from the date of the settlement agreement, not the cessation of employment. To a

¹² Ross (n 4) 1.

lesser extent, we have also seen restraints included in settlement agreements despite the employment contract not containing any restraints.

- Employers providing employees with ‘exit agreements’ whereby employees sign restraints upon cessation of employment in return for being paid their lawful entitlements (e.g. notice, accrued annual leave, redundancy).

While non-competes have proliferated in Australia, the types of interests that may be protected by such restraints have also increased. Historically, the common law restraint of trade doctrine held that the types of interests that could be legitimately protected by restraints included confidential information, trade secrets, and client lists or customer connections. However, courts in Australia have more recently acknowledged that an employer’s interest in a ‘stable workforce’ is also sufficient to justify restraints as reasonable.¹³

Overall, non-competes have become more prevalent, apply to a broader cohort of workers including low-income workers, and can be found in a wide number of scenarios.

3.1.3 Chilling Effect

Under the common law doctrine, workers face inherent uncertainty and confusion about whether the restraints in their contracts are enforceable and whether their former employer will seek to enforce the restraint. This creates a chilling or intimidating effect whereby workers avoid challenging the validity of restraints and instead change their behaviour, even when the restraint in question is unlikely to be enforceable.¹⁴

Our experience is that non-competes cause employees to turn down job offers, avoid looking for new jobs, resign from new jobs, seek employment in different industries, or not start their own businesses. This can compound the impact of discriminatory, or hostile work environments because workers believe they are unable to leave due to the non-compete clauses in their contracts.

¹³ Ross (n 4) 17.

¹⁴ Christopher Arup et al, ‘Restraints of Trade: The Legal Practice’ 2013 36(1) *UNSW Law Journal* 1.

Case Study – Casual NDIS Disability Support Worker

Our client was employed as a casual Disability Support Worker for a NDIS-registered disability service provider of in-home support services on the south coast of NSW. Our client commenced employment in March 2023 pursuant to a written employment contract and was covered by the SCHADS Award and paid \$40.46 per hour. There was a transmission of business, and our client was offered casual employment with the new employer.

Less than two weeks after the transmission of business, our client was dismissed for alleged misconduct. After the termination of her employment, our client began providing disability support services as an independent contractor. Some of the participants our client worked with during her employment sought services from our client.

Our client later commenced employment with a different NDIS-registered disability service provider. More of the people with disability that our client had provided services to during her employment sought to transfer their NDIS plans to our client's new employer.

Our client received a letter from her former employer stating that our client had breached the restraint of trade clauses in her employment contract which at a maximum restrained our client from competing with the former employer in Australia or New Zealand, or soliciting clients, for a period of 6 months.

Our client sought legal advice from us about the enforceability of the restraints and whether she could remain working in the disability support sector. Our client was particularly stressed by the experience and was fearful of accepting work from her new employer, in case her former employer decided to commence legal action.

There are two broad reasons why the existing law and practice regarding restraints of trade is plagued with confusion and uncertainty. Firstly, the doctrine has not developed to set out clear rules about what constitutes a 'reasonable' geographic area or duration of a non-compete. Rather, the doctrine is a subjective and highly fact-dependent test that considers the 'reasonableness' of a non-compete having regard to the other elements of the restraint, and against the 'legitimate interest' the employer is seeking to protect. This has led to a diversity of judicial opinion and a general uncertainty about the enforceability of non-competes.

Secondly, the common law doctrine creates further confusion and uncertainty as courts can sever an invalid part of a non-compete without affecting the original nature of the

clause and the contract (often referred to as a 'blue pencil' doctrine).¹⁵ This encourages employers to draft non-competes broadly and increasingly rely on 'cascading' or 'laddered' restraint clauses to reduce the risk that a non-compete will be unenforceable.

It is our experience that employer overreach is common when drafting restraint clauses as we see cascading variations of the restraint's duration, geographic area, as well as the activities affected. We commonly advise clients that the non-compete in their contract is unlikely to be enforceable due to the scope of restraints being unreasonable, however we are unable to give clients certainty, particularly where there are cascading or laddered restraints.

Case Study – The 'Indefinite Restraint'

Our client was a health worker in a regional area earning less than \$80,000.

Our client's employment contract contained an extreme example of post-employment restraints including cascading non-solicitation and non-compete restraints which defined the maximum duration of the restraints as "indefinite" and the maximum geographical area as "Australia and New Zealand".

Our client's employer lost the contract with a major health service in the area. The company that won the contract offered our client a job. Our client's former employer threatened to enforce the restraint of trade clause in our client's contract. Despite our advice that the non-compete was highly unlikely to be enforceable in its entirety, our client did not accept the contract holder's job offer for fear of legal action by their former employer.

The 'chilling effect' of broad non-compete clauses was made clear in a recent unfair dismissal decision where the Fair Work Commission (**FWC**) considered the effect of a non-compete on an employee's efforts to find new work after being unfairly dismissed.¹⁶ The non-compete in question was similar to those we commonly see as it stated that for a period of 12 months after the termination of his contract of employment, the employee was not to work as an employee or contractor or advisor or in any other capacity in any business which was "engaged in activities substantially

¹⁵ See *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 132; *Attwood v Lamont* [1920] 3 KB 571, 578; *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, 44–48.

¹⁶ *Mr Andrew Goddard v Richtek Melbourne Pty Ltd* [2024] FWC 979.

similar or identical to the Company and provides services substantially similar or services offered by the Company.”

The employee in question had not applied for any jobs since being dismissed and remained unemployed at the time of hearing which would usually weigh against the FWC awarding compensation.¹⁷ However, the FWC accepted the employee’s reasoning that he had not applied for jobs because he believed the non-compete prevented him from doing so and he was worried the employer would commence legal action. As Deputy President Colman noted at [27]:

Ordinarily, one would expect a person to have applied for jobs in the sector of their expertise as a reasonable step in mitigating loss. However, the presence of a non-compete provision in his contract explains Mr Goddard’s decision not to do so. Although the provision is most likely unenforceable on the basis that its scope is unreasonable, an ordinary worker cannot be expected to know this, and it is understandable that Mr Goddard would not want to risk embroiling himself in a legal controversy by acting contrary to an express provision in his contract. I therefore make no deduction in respect of Mr Goddard’s decision not to apply for jobs that might have involved a prima facie contravention of the restraint of trade provision in his contract of employment.

...

One wonders why such restraint of trade provisions are so commonly found in the contracts of ordinary workers and whether they really protect any legitimate business interest of the employer, or merely serve to fetter the ability of workers to ply their trade, and to reduce competition for labour and services.¹⁸

Ultimately, the uncertainty of non-competes operates to the benefit of businesses and the detriment of workers. This is because inherent uncertainty means that variables other than the legal merits of the restraint are active in determining the outcomes of disputes and the observance of contracts overall. As Christopher Arup *et al* note, ‘in restraint cases, these key variables can be characterised as the use of inside knowledge and hard bargaining – variables that on the whole appear to favour the employer over the employee.’¹⁹

Given the increased prevalence of non-competes in Australia, this disproportionately disadvantages low-income workers who do not have access to legal knowledge and advice, and who in our experience, commonly adhere to the terms of a restraint when

¹⁷ *Fair Work Act 2009* (Cth) s 392(2)(d).

¹⁸ *Goddard v Richtek* [2024] FWC 979 at [27].

¹⁹ Arup *et al* (n 15) 5.

threatened with enforcement action by an employer regardless of whether the restraint is enforceable at law.

3.1.4 Enforcing Non-competes

Under the common law doctrine, the task of enforcing a restraint is left to the courts. As noted above, however, non-competes are instead more commonly self-enforced by employees who are uncertain and confused, and ultimately prefer to avoid the risk of legal action. As noted by Arup et al, this practice is concerning because the courts' policing of the public interest is routinely bypassed and the mobility of employees with their know-how and talent restricted by default.²⁰

In our experience, it is rare for employers to commence court proceedings against ordinary workers as non-competes are difficult to enforce and litigation is expensive, complex, and time-consuming. However, it is common in our experience that employers use hard bargaining tactics to achieve either submission or settlement, including:

- restating restraint clauses in termination letters or exit agreements and reminding employees that they remain bound by the restraints; and
- threatening legal action where the employer considers an employee has engaged, or is likely to engage, in conduct that is said to be in breach of a restraint.

In light of the above, employers appear to clearly understand that they can obtain a result without proceeding to court, as even the threat of legal action is enough to change behaviour in most instances. It is little wonder then that ordinary workers tend to overestimate the likelihood of employers successfully enforcing a restraint and underestimate their own ability to push back on a threat of legal action or defend a claim by a former employer. Our advice to clients that the non-compete in their contract is probably unenforceable, but this is ultimately a question for the court, provides them with little comfort.

Where an employer does commence proceedings in court to enforce a non-compete, the initial enforcement action is usually an interlocutory application for injunctive relief. Most matters are determined at this stage without proceeding to a final determination. This tends to occur very quickly given the longer an employer leaves the application, the less convincing its argument for relief and the less practical utility it will have given the limited nature of most restraint periods.²¹

²⁰ Ibid 6.

²¹ See, eg, *Capgemini US LLC v Case* [2004] NSWSC 674.

Various commentators have criticised how commonly restraint of trade matters are determined by way of injunctive relief, as it means the merits of the employer's case are not fully tested in court. Instead, an employer need only establish an arguable case on the merits for the balance of convenience test to favour the granting of injunctive relief.²² As Arup et al argue:

*if the court considers that an arguable case is made out, it is rare to see a decision in which the hardship to the employee tips the balance of convenience against granting the employer the injunction. Generally, the balance of convenience is weighed in the employer's favour. The court is more concerned about the threat of an immediate injury to the employer's interest.*²³

3.1.5 Alternative Options

1. Ban non-competes

We consider that a ban on non-compete clauses is the best policy response to address the increasing prevalence of non-competes.

Moreover, aside from the protective function of banning non-competes, a ban would also function to promote innovation and competition within the Australian context. Riley criticises the common law doctrine for contributing to the 'the sterilisation of the talent of individuals, and the stifling of competition in the market for services.'²⁴ Currently, the common law doctrine stifles the ability of workers with expertise, talent and industry insight from contributing to new and innovative projects.

To compare with other jurisdictions, California has had the longest and most robust history of prohibiting non-compete agreements amongst state jurisdictions in the United States and has become a centre for technological innovation. While Legal Aid NSW can best speak to the protective function of a non-compete ban, the Federal Government should not neglect the competitive function of such a ban by maximising the capacity of highly skilled workers to contribute to the national economy.

The Federal Government should be emboldened to implement a national ban on non-competes in Australia, particularly after the United States Fair Trade Commission's (FTC) recent decision to implement a federal ban in the United States. Several US states had already banned non-competes, and so the FTC had the benefit of comparative data between states that do and do not enforce non-competes to

²² See, eg, Arup et al (n 15).

²³ Arup et al (n 15) 10.

²⁴ Joellen Riley 'Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants' (2012) 34(4) *Sydney Law Review* 617, 621.

understand the potential economic impacts of a federal ban. Restraints are also largely prohibited in various other jurisdictions.²⁵

Professor Alan Fels AO has recommended that non-compete clauses be banned in Australia in his Final Report on the ACTU commissioned Inquiry into Price Gouging and Unfair Pricing Practices.²⁶ Overall, the picture shows that a ban is likely to have a positive effect for workers in Australia and is unlikely to have a negative economic impact.

Recommendation 1: Implement a national uniform law that bans the use of non-compete clauses in Australia.

2. Limit the use of non-competes

If the Federal Government does not introduce a complete ban on non-competes in Australia, it should consider implementing legislative reform to limit how non-competes can be used, and the workers who can be subject to such clauses. There are various policy options that could be applied concurrently to ensure that low paid workers are not subject to restraints.

a) Income threshold

As set out above, non-competes commonly apply to low-income workers who have less access to legal advice and limited bargaining power, and who are more likely to adhere to a non-compete even where it is likely to be unenforceable. A common policy response in other countries is to impose an income threshold so that non-competes are unenforceable for workers who earn less than the prescribed amount.²⁷ One option would be to implement a threshold based on the current 'High Income Threshold' in the *Fair Work Act 2009* (Cth) (**FW Act**) which limits unfair dismissal protections to employees beneath the threshold.²⁸

b) Limits on duration and compensation during restraint period

The ability of courts to sever unenforceable parts of a restraint has meant that employers frequently issue contracts with ladder or cascading restraint of trade clauses. A common policy response overseas is to implement a limit on the duration of restraints. For example, the United Kingdom has proposed to limit restraints to a 3-

²⁵ For example, Colombia, Malaysia, Mexico, India, and the Ontario province in Canada.

²⁶ Alan Fels, *ACTU Inquiry into price gouging and unfair pricing practices* (Final Report, February 2024).

²⁷ For example, Belgium. Also, various US states including Colorado, Illinois, Maryland, Massachusetts, New Hampshire, Nevada, Oregon, Rhode Island, Virginia and Washington District of Columbia.

²⁸ *Fair Work Act 2009* (Cth) s 382.

month term limit. In Spain, there is a 6-month limit with a graduated limit up to 24 months for technical employees.

Further, many countries require employers to pay extra compensation during a restraint period in order for it to be valid and enforceable.²⁹ This limitation could be applied in tandem with the limitation on restraint of trade to high income earners.

A complete or partial ban on non-competes should include all employees and extend to independent contractors and 'employee-like' workers, given the recent extension of protections under the FW Act to these cohorts of workers.³⁰ This is necessary because non-competes have become increasingly common for these workers, and they are often lowly paid, their work is insecure, and they have limited bargaining power.

Recommendation 2: Any policy response should apply to all employees and also extend to independent contractors and 'employee-like' workers.

3. Other Matters

a) Civil penalties

Overseas research suggests that some employers are likely to continue issuing contracts with restraint of trade clauses even where a ban is introduced.³¹ Any policy response to ban non-competes completely or partially should also expose employers to a civil penalty where they enter an unenforceable restraint.

Recommendation 3: Implement civil penalties to deter employers from using unenforceable restraints.

b) Information

If the Government bans or limits the use of restraint of trade clauses, employers should be required to inform workers whether restraints found in existing employment contracts are enforceable by a prescribed date several months after any law receives royal assent.

²⁹ For example, China, Belgium, Denmark (40 or 60% of salary), Finland (40% of salary), France, Germany (50% of salary), Poland, Portugal, Spain (20-70% of salary), and Sweden.

³⁰ *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

³¹ Evan Starr, *Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence* (Report, 31 October 2023).

This, combined with an effective public relations strategy, will ensure the changes are clearly communicated and understood by all businesses, including small businesses, which will help ensure compliance and deter employers from knowingly or unknowingly continuing to use unenforceable restraints.

Recommendation 4: Require employers to inform workers in writing when a non-compete is unenforceable.

c) Existing Employer Protections Sufficient

Employers would no doubt be concerned that any outright ban on non-competes is going to adversely affect their ability to protect their intellectual property, trade secrets, or client lists. However, we note that a ban would not leave employers without adequate protections for their legitimate business interests.

Employers could rely on targeted client non-solicitation clauses and protections for intellectual property, or the protections in equity against breach of obligations of confidence or fiduciary duties and duties of good faith and fidelity. We address these in more detail in our responses below. As Arup et al also note, 'employers also have strategies beyond the law, such as the use of attractive staff retention packages, to protect their interests. On this basis, reliance on non-competes is regarded as a lazy fallback option'.³²

3.2 Do you think the Restraints of Trade Act 1976 (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?

The *Restraints of Trade Act 1976 (NSW) (RTA)* does not strike the right balance between the interests of businesses, workers, and the wider community. Instead, the RTA entrenches the unfairness inherent in the common law doctrine by indirectly encouraging employer overreach and increasing employee uncertainty about the enforceability of restraints.

This is because under s 4 of the RTA, a restraint is valid to the extent to which it is not against public policy, whether it is in severable terms or not. The RTA gives courts discretionary power to partially enforce a restraint by reading it down to what is reasonable, even if it cannot be 'blue pencilled.'

³² Arup et al (n 15) 26.

The RTA was a product of law reform designed to combat the clear deficiencies of the common law doctrine as they were then perceived.³³ While courts have since struggled with the application of the RTA, the correct approach to the application of s 4 was settled in the 1980s and continues to be accepted today, which is as follows:³⁴

1. The Court determines whether the alleged breach infringes the terms of the restraint.
2. If there is an infringement, the Court determines whether the restraint is against public policy.
3. If the restraint is not against public policy, the restraint will be valid, subject to any s 4(3) order detailing the extent of the invalidity.
4. If there is no infringement, the RTA will have no function.

The practical operation of the RTA is that businesses are indirectly encouraged to draft non-competes as broadly as possible to ensure that if they litigate, they walk away with something. As Arup et al note from their interviews with employment law practitioners, the usual outcome of litigation under the RTA is that the court reduces the length of the restraint period. Because of this likely outcome, Arup's interviewees considered that the NSW jurisdiction was more accommodating of employers than the other jurisdictions and so there was a lower risk factor attached to litigating there.³⁵

As NSW has the highest rates of litigation for non-compete matters, this has a substantial impact on the development of the law and practice with respect to non-competes. Should a complete ban on non-competes not be implemented, any implementation of a partial ban at the federal level will need to carefully consider the interaction with the RTA to avoid conflict between federal and state laws.

3.3 Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?

The prevalence of non-compete clauses has increased over the last 5 years, and absent a policy response, this trend is likely to continue.³⁶ Non-competes are no longer confined to senior level executives but are instead used across all industries and occupation types, including for low-income workers. We have detailed above various examples of broad 'cascading' restraints in contracts of ordinary and low-income employees, which has led to increased uncertainty and confusion about their

³³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, 1179.

³⁴ *Orton v Melman* [1981] 1 NSWLR 583.

³⁵ Arup et al (n 15).

enforceability and a 'chilling effect', whereby workers change their behaviour regardless.

Legal Aid NSW considers the current approach is inherently unfair for ordinary and low-income workers as the common law doctrine and the RTA in NSW fail to sufficiently consider the interests of workers, or the relative bargaining power between the parties. Given the clear imbalance in resources between workers and businesses, the current approaches encourage employers to overreach with broadly drafted restraints and discourage workers from challenging their validity, which results in workers passing up better job opportunities.

We consider that an immediate policy response is needed to ensure ordinary and low-income workers are not subject to non-competes at all. In particular, non-competes should not apply at all to low-paid employees, casual employees, employees under 18 years of age, or gig workers.

3.4 Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.

3.4.1 Complete ban

Legal Aid NSW considers that a policy approach that bans non-competes completely could be modelled on the United States' proposal to ban non-competes as detailed in the FTC's Final Non-Compete Clause Rule on 23 April 2024 (**Final Rule**).³⁷ In summary, the Final Rule proposes to:

- prohibit an employer from entering, or attempting to enter, a non-compete clause with a "worker" (including an independent contractor) or representing that a worker is subject to a non-compete clause.
- allow employers to maintain existing non-compete agreements with "senior executives", (those with over US\$151,164 annual compensation and in a 'policy making position' for the business) but bars an employer from entering, or attempting to enter, a non-compete clause with a senior executive after the Effective Date of the Final Rule.

The Final Rule supersedes all state laws to the extent, and only to the extent, that a state's laws permit or authorise conduct prohibited under the Final Rule or conflict with the Final Rule's notice requirements. It also sets out exceptions including that it does not apply to non-competes entered by a person pursuant to a bona fide sale of a business entity.

³⁷ Federal Trade Commission, Final Rule, Non-Compete Clause Rule, 16 CFR Part 910, RIN 3084-AB74, 23 April 2024.

Further, the Final Rule requires an employer to provide clear notice to workers subject to a prohibited non-compete, in an individualised communication, that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker. An employer must also provide notice by the Final Rule's Effective Date by hand-delivery, by mail at the worker's last known street address, by email, or by text message.

3.4.2 Partial ban

There are various alternative policy approaches that can be drawn from should a partial ban on non-competes be implemented instead. We consider the primary focus of any policy approach should be to ensure that non-competes can no longer be used for low-income workers. For example, various US states have already banned non-competes for low-income employees, casual employees, and employees under 18-years old by implementing prohibitions that include income thresholds.³⁸ We refer to our recommendations above regarding the imposition of an income threshold in Australia.

We also refer to the policy approach of the United Kingdom which has proposed to limit non-competes to a 3 month term limit. In Spain, there is a 6-month limit with a graduated limit up to 24 months for technical employees. In Denmark, the Danish Act on Restrictive Covenants outlines specific requirements for a non-competition agreement, including the following:

- the employee must hold a special position of trust
- the clause must indicate the specific circumstances as to why such a clause is necessary, and
- certain compensation must be paid during the restricted period.³⁹

Further, the approach in Australia should also consider the countries that have also implemented a requirement that workers be compensated during the period of the restraint period. For example, in Germany workers receive 50% of their regular salary during the period of a restraint and in Finland workers receive 40%. In Spain, workers are required to be paid 'adequate compensation' during a restraint period, which can range from 20 – 70% of their regular salary. In Denmark, workers receive either 40 or

³⁸ Several states and cities in the US (eg, Colorado, Illinois, Maryland, Massachusetts, New Hampshire, Nevada, Oregon, Rhode Island, Virginia, Washington, District of Columbia) have enacted laws establishing salary thresholds or banning non-competes for workers deemed not to pose a competitive threat, such as employees who are 18 years old or younger and employees paid on an hourly basis.

³⁹ The Danish Act on Restrictive Covenants.

60% of their monthly salary (depending on the duration of the restriction) at the effective date of termination of employment.

3.5 Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?

It is our experience that non-competes are now common in the employment contracts of ordinary and low-income workers. While we have set out our primary policy options above, we consider the Competition Review should also consider the following.

3.5.1 Bargaining power

The Issues Paper refers to evidence that rising market concentration in Australia is giving employers more bargaining – or ‘monopsony’ – power in some markets. This can have disproportionate effects on certain workers subject to a non-compete based on the work they do, where they work, and their personal circumstances. It is our experience that workers in regional areas and small towns are particularly affected, as are workers with caring responsibilities, and CALD workers particularly migrant workers on sponsorship visas. Any policy response should have particular regard to these workers given the uncertainty of non-competes is heightened and the risk of challenging them is greater.

3.5.2 Limited access to legal aid

There are few avenues through which workers who are defendants to claims that they have breached a restraint of trade may obtain legal representation. Whilst Legal Aid NSW can provide some advice and limited assistance, a grant of legal aid is not available for defendants to breach of contract claims, including claims of breach of restraint of trade clause.

A defendant to a claim of breach of restraint of trade could attempt to obtain assistance from a community legal centre, but community legal centres typically do not represent defendants to breach of contract claims. The worker could attempt to obtain pro-bono assistance from a private solicitor, but most law firms have a limited capacity to provide pro-bono advice. Most frequently, if the client wishes to obtain legal representation, he or she will need to incur the significant cost of engaging a private solicitor.

3.5.3 Boilerplate contracts

It is apparent that many employers rely on boilerplate employment contracts that are readily available from online legal or human resources services. These often come standard with ‘laddered’ or ‘cascading’ restraint clauses and are drafted broadly. As Riley has observed,

*'By the power of the word-processed precedent document, restraints that were once considered appropriate only to preserve the value of goodwill purchased from a business owner are now appearing in contracts for moderately paid salary earners.'*⁴⁰

We have set out examples above with 'indefinite' or 24-month restraints periods, and geographic areas that would, at a maximum, restrain working for a competitor in Australia and New Zealand. It is our experience that employers, particularly smaller businesses, often consider such restraints are enforceable precisely because they are in the contract. Our clients receive legal threats and letters of demand from business owners citing these maximum restraints and threatening legal action for perceived breaches.

While many of these clauses are unlikely to be enforceable, it is apparent that employers are aware that even the threat of legal action has a 'chilling effect' on ordinary workers.

⁴⁰ Riley (n 25) 620.

4. Non-solicitation of clients and other business contacts

4.1 What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?

Businesses use client non-solicitation clauses in employment contracts to protect their proprietary interests by seeking to prevent an employee from soliciting or enticing away their clients, customers, or suppliers if that employee leaves to set up their own business or join a competing business. A non-solicitation clause usually includes prohibitions on:

- approaching former colleagues to entice them away from their employment;
- approaching clients of a former employer with the intention to entice them to use their products or services instead; and
- approaching suppliers to provide their goods or services to them instead.

Legal Aid NSW acknowledges that non-solicitation clauses are a more targeted instrument than non-compete clauses and that there are legitimate business interests of employers that may be appropriately protected using non-solicitation clauses. However, as we have set out in our responses above, restraints such as non-solicitation clauses are often drafted broadly with 'laddered' or 'cascading' clauses that render them likely to be unreasonable and unenforceable.

It is our experience that such clauses are commonly used in employment contracts of ordinary and low-income workers and can have a disproportionate impact on certain types of workers.

Case Study – Casual cleaner receives cease and desist

Our client worked as a casual cleaner and contacted a client who no longer wanted to use her former employer's services. Our client was served a cease-and-desist letter threatening legal action if the breach continued.

Accordingly, Legal Aid NSW considers that the use of non-solicitation clauses in the employment contracts of low-income workers, and insecure workers such as casual employees, workers under 18 years of age, and gig workers is inappropriate.

Recommendation 5: Ban the use of client non-solicitation clauses for low-income workers and insecure workers.

4.2 Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.

Legal Aid NSW considers that more consideration should be given to the impact of non-solicitation clauses on clients, particularly in the care sector. It is our experience that restraints such as client non-solicitation clauses and non-competes are commonly used in the care sector for health workers, and aged care and disability support workers.

It is our experience that care workers commonly seek legal advice after they have ended their employment with a NDIS-registered care provider and they either join another provider or commence working as an independent contractor. Their former employer may threaten legal proceedings on the basis that clients have left and the business considers the employee to have solicited or enticed the clients to do so.

Case study – NDIS worker dismissed after clients approached for care

Our client was dismissed from her employment as a physiologist for ‘breaching’ the non-solicitation clause in her contract. Some clients had contacted her through her private practice when the waitlist was too long at her employer’s practice. In effect, the employer’s use of the non-solicitation clause prevented clients from receiving timely quality care.

Choice of care is vital for NDIS participants to ensure they receive the highest quality of care. The NDIS is designed to give people with a disability the right to choose who delivers their support and how their support services are delivered and obliges providers to act with respect for this right.⁴¹ The public interest in upholding this right for people with a disability to choose their carers should not be outweighed by commercial interests of employers. Continuity of care may be desirable for a person with a disability because:

- A carer has rapport with the person and insight into their condition.

⁴¹ NDIS Commission, *NDIS Code of Conduct – Guidance for NDIS Providers* (September 2023).

- The person may want to avoid the disruption of a new carer who is unfamiliar with their needs or condition.
- The person's family is familiar with and trusts a particular carer with the care of their family member. This may be particularly important where the carer assists the person at the person's home.
- Where a person is in a rehabilitative process, recovery and routines may be disrupted with the introduction of a new and unfamiliar carer.
- Continuity of care may ensure that a trauma-informed approach is taken towards the person's care.

Case Study – Legal threats by employer against casual NDIS worker

In March 2024, our client resigned from her employment as a casual psychosocial recovery coach with an NDIS provider ('former employer').

Our client's contract of employment had a cascading non-solicitation clause which had a maximum restraint period of 12 months. The clause prevented our client from soliciting current and prospective clients of her former employer directly or through a competing business.

After our client left her employment, some of her former employer's clients left the service. One person contacted our client after she resigned and sought to continue to receive services from her.

In April 2024, our client received a letter from her former employer alleging a breach of the non-solicitation clause in her employment contract. Our client was given two days to respond to their allegations of her breach of contract. In her response, our client disputed that she had breached the non-solicitation clause:

Four days after sending her reply, our client received a response from the HR department of her former employer which acknowledged the feedback provided by our client and made no mention of the restraint of trade clause.

Recommendation 6: Ensure any policy response has regard to the prevalence of client non-solicitation clauses in the care sector and the detrimental effect of such clauses on NDIS participants and their quality of care.

5. Non-solicitation of co-workers

5.1 What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?

It is our experience that non-solicitation clauses have become common in the employment contracts of low-income workers and that they are often broadly drafted to include restraints on both client and co-worker non-solicitation.

Businesses use co-worker non-solicitation clauses in employment contracts to protect their proprietary interests and maintain a stable workforce. Businesses seek to protect their business interests by preventing competitors from soliciting staff that give them a competitive advantage or who have unique skills or expertise. The scenario that employers seek to protect against is an ex-employee with intimate knowledge of the business' intellectual property or trade secrets going to work for a competitor or starting their own business and soliciting or enticing other staff to go and join them.

While businesses may have a legitimate interest in preventing trade secret disclosure, as Graves observes, there is no inherent link between co-worker solicitation and trade secret disclosure.⁴² The risk of trade secret disclosure is not guaranteed to eventuate or increase because a former employee solicits a former colleague. This makes co-worker non-solicitation clauses an inappropriate legal mechanism to address this risk.

Moreover, there are already pre-existing, appropriate legal mechanisms available for employers seeking to prevent trade secret disclosure. While Australia does not have a discrete legislative regime for trade secrets protection, the *Corporations Act 2001* (Cth) (**Corps Act**), contractual confidentiality clauses, non-disclosure agreements and copyright law all provide different and effective legal mechanisms to protect employers from the risk of trade secret misappropriation. We discuss these protections further below.

Legal Aid NSW considers co-worker non-solicitation clauses in employment contracts should be banned entirely. Such clauses are inherently unfair as they seek to restrain workers that are not party to the contract (i.e. the employee who is said to have been solicited or enticed away). Other commentators have argued that co-worker non-

⁴² Charles Graves, 'Questioning the Employee Non-Solicitation Covenant' (2022) 55(4) 959, 988.

solicitation clauses treat staff as objects and not subjects, and that such clauses should be rendered 'entirely unenforceable.'⁴³

If co-worker non-solicitation clauses are not banned, their use should be substantially restricted to ensure they do not apply to low-income workers, or insecure workers such as casual employees, workers under 18 years of age, and gig workers.

Recommendation 7: Introduce a national uniform law banning the use of co-worker non-solicitation clauses. In the alternative, prohibit their use for low-income and insecure workers.

⁴³ Ross (n 4) 30.

6. Non-disclosure clauses

6.1 What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s183 of the Corporations Act 2001 that are available?

6.1.1 The prevalence and impact of non-disclosure clauses

Businesses use non-disclosure clauses to restrict employees from disclosing confidential information during, and after the conclusion of, the employment relationship. This is intended to protect business' unique processes, technologies, or strategies by restricting disclosure of information such as intellectual property, business plans, trade secrets, client lists, research, and commercially sensitive information.

ABS research indicates that non-disclosure clauses are commonly used in Australia with 45.3% of businesses using a non-disclosure clause, and 81.3% of businesses using non-disclosure clauses for over three quarters of their workers.⁴⁴ It is our experience that most employment contracts contain confidentiality or non-disclosure clauses, and that such clauses can be found in the contracts of low-income and insecure workers, such as casuals and gig workers.

6.1.2 Alternative protections available to businesses

Should a policy response restrict the use of non-disclosure clauses in employment contracts, alternative protections for businesses will remain available. In addition to contract law principles, equitable obligations of confidentiality are applicable as well as statutory protections under the Corps Act. For example, sections 182 and 183 of the Corps Act prohibit officers or employees of a business from improperly using their position, or information they obtain while working, to gain an advantage for themselves or someone else, or which causes a detriment to the business.

The protection under s 183 of the Corps Act has been held to reflect a fiduciary obligation under the general law.⁴⁵ The duty that it imposes also has a substantial overlap with the equitable duty of confidence.⁴⁶ The advantage of s 183 for businesses

⁴⁴ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia* (Catalogue No 6306.0, 1 January 2024).

⁴⁵ *SBA Music Pty Ltd v Hall* (No 3) [2015] FCA 1079 [28]; as cited in *Smart EV Solutions Pty Ltd v Guy* [2023] FCA 1580 at [69].

⁴⁶ *Plus One International Pty Ltd v Ching* (No 3) [2020] NSWSC 1598 [547].

is that it does not require proof that the information is confidential, rather the focus is on how the information was acquired.⁴⁷ The issue is to be judged objectively.⁴⁸

Further, s 183 extends to situations in which a director, officer or employee makes use of confidential information *after* they have resigned or been terminated, and also applies to workers who may not be covered by a contract of employment.⁴⁹ This is because s 183 applies to 'officers', which includes anybody '*who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation*'.⁵⁰ As a result, businesses avoid the need for complex arguments about whether a worker is an employee or a contractor.

The advantage of the protections under s 183 of the Corps Act for employees is that businesses can enforce them only where it can be established that the employee made improper use of the information in order to directly or indirectly gain an advantage for themselves or someone else, or to cause detriment to the business. In contrast, non-disclosure clauses are often broadly drafted, and employees remain uncertain about their enforceability, which results in a chilling effect.

Although we do not advise clients on disputes arising from the Corps Act, it is clear that the protections under sections 182 and 183 are regularly relied upon by businesses in litigation. In addition, where the information is subject to copyright, employers can also utilise s 115 of the *Copyright Act 1968* (Cth) (**Copyright Act**) as an additional avenue for obtaining damages against ex-employees who use confidential company information. In applying this provision, courts must have regard to, among other things, the flagrancy of the copyright infringement, the conduct of the employee, and any benefit shown to have accrued to the employee by reason of the infringement. This provision has been successfully litigated in combination with s 183 of the Corps Act with damages award against the former employee.⁵¹

Accordingly, businesses have effective alternative protections available should a policy response restrict the use of non-disclosure clauses. These protections are already frequently used by businesses in litigation and remove the uncertainty and chilling effect of broadly drafted non-disclosure clauses in employment contracts.

⁴⁷ Ibid.

⁴⁸ *Marble Group Services Pty Ltd v Blenkinsop* [2023] WASC 464 at [53].

⁴⁹ *TICA Default Tenancy Control Pty Ltd v Datakatch Pty Ltd* [2016] FCA 815 ('TICA').

⁵⁰ *Corporations Act 2001* (Cth) s 9.

⁵¹ *SAI Global Property Division Pty Limited v Johnstone* [2016] FCA 1333. See also *TICA* (n 51).

7. Restraints on workers during employment

7.1 When is it appropriate for workers to be restrained during employment?

Restraints placed on workers during their employment generally relate to:

- non-disclosure of confidential information such as intellectual property, business plans, trade secrets, client lists, research, and commercially sensitive information to protect the business' unique processes, technologies, or strategies; and
- not competing with the employer business either by going into business on their own or working for a competitor.

Senior or executive-level employees, as compared with low-income or insecure employees, may have the opportunity to use their position for personal gain, or someone else's gain, or cause detriment to the employer such that restraint during employment for these employees may be appropriate.

It is generally accepted that implied duties of confidence, good faith and fidelity at common law and in equity, apply to workers as long as an employment contract subsists. However, acts of competition against an employer by low-income workers may be necessary for workers to earn a living wage.

Consideration should be given to whether there should be statutory protection for low-income and insecure workers to allow them in limited circumstances to compete with their employer during employment.

7.2 Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

Workers engaged in part time, casual and gig work are often the most vulnerable workers advised by Legal Aid NSW. Gig workers and other workers engaged in employee-like work are particularly vulnerable to exploitation.

A recent survey of independent contractors (including gig workers) found:

- most respondents worked significant hours, with 41 per cent working over 40 hours per week;
- of those working over 40 hours, at least 66 per cent earned less than the minimum wage; and

— workers with greater dependence on 'gig work' have lower take-home pay⁵²

Workers engaged in these arrangements are often women, workers from non-English speaking backgrounds, younger and older workers and workers with a disability.

Part-time, casual, gig workers, and other employee-like workers are vulnerable as these roles often do not provide the worker a living wage and so workers need to supplement their income through additional jobs and income streams. Non-compete clauses serve to prevent these workers from being able to earn a living wage as well as limiting the opportunities for the development of workers' skills, thereby limiting the opportunities for them to enter more secure employment.

Legal Aid NSW recommends that there be a complete ban on the use of restraint of trade clauses. In the event that the government does not implement a full ban, Legal Aid NSW recommends that any legislative amendment should make unlawful restraints of trade in relation to part time, casual and gig workers.

Recommendation 8: Implement a complete ban on the use of restraint of trade clauses for insecure workers including casual workers, gig workers, and other workers engaged in employee-like work.

⁵² Australian Bureau of Statistics, *Working Arrangements* (Catalogue No 6336.0, 13 December 2023). The ABS reports that the majority of gig workers appear within existing data as independent contractors using an Australian Business Number but are difficult to distinguish from other self-employed people without employees.

8. No-poach and wage-fixing agreements

Workers are typically unaware they are subject to no-poach or wage-fixing agreements as these agreements occur between businesses and often remain confidential. Even if workers were aware of a wage fixing or no poach agreement, they have limited standing to challenge the agreement given that the validity of such agreements is dealt with under the common law restraint of trade doctrine and the common law provides that third parties injured by a restraint have no remedy.⁵³

We see this most commonly when we advise clients employed by franchises such as Bakers Delight, KFC, McDonald's, and Domino's which reportedly all use no-poach clauses as a standard term in their franchise agreements. These clauses prevent franchisees from hiring workers from other stores within the chain.⁵⁴ As noted in the Issues Paper, the Franchise Disclosure Register indicates that 89.9% of all franchisors in Australia impose some kind of restraint of trade on franchisees.⁵⁵

The fast-food franchise sector in Australia includes low-wage and high-turnover businesses with a high proportion of young and casual workers. Workers seek advice from us after being barred from taking a second job at a different franchise or with a competitor because of a no-poach clause in the franchise agreement. These workers are often paid the minimum junior rates under the *Fast Food Industry Award* and are seeking to supplement their income with a second casual job. No-poach agreements limit their ability to do this, which can be further exacerbated by other factors such as if the worker lives in a regional area, or an area with limited employment opportunities.

No-poach agreements are also prevalent in the United States' fast-food franchise sector with efforts by regulators there to curb their use. Studies in the US have shown the removal of no-poach agreements increased average wages of job postings for roles in the affected businesses by around 5-6% and increased the overall earnings of workers in those businesses by around 4%.⁵⁶

Overall, no-poach agreements limit a worker's ability to move to, or take up, a role with a different employer that may be a more suitable match for them. Wage-fixing agreements work similarly as they reduce the incentive for workers to search for more

⁵³ John Heydon, *The Restraint of Trade Doctrine* (4th ed, 2018) 301.

⁵⁴ Andrew Leigh, *How uncompetitive markets hurt workers* (2023) 26(1) *Australian Journal of Labour Economics* 16.

⁵⁵ *Issues Paper*, p. 34.

⁵⁶ See Francine Lafontaine, Saattvic Saatvic and Margaret Slade, 'No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing?' (Research Paper, Vancouver School of Economics, 2023); B. Callaci et al., 'The Effect of Franchise No-Poaching Restrictions on Worker Earnings' (Discussion Paper, IZA Institute of Labor Economics, 2023) Abstract.

productive roles. In turn, they artificially reduce workers' wages and reduce workers' bargaining position to demand better wages.

Other jurisdictions have acknowledged the anti-competitive nature of no-poach and wage-fixing agreements and have implemented policy responses to limit their use. For example, Canada recently prohibited certain no-poach and wage-fixing agreements under existing criminal and civil competition law prohibitions, given the potential for these agreements to undermine competition like any other price-fixing agreement between competitors.⁵⁷

Legal Aid NSW considers that Australia should follow the example of other jurisdictions such as Canada, and prohibit certain no-poach and wage-fixing agreements. Any policy response in Australia should have regard to the following considerations:

- The prevalence of no-poach clauses in the Australian fast-food franchise sector which includes low-wage and high-turnover businesses with a high proportion of young and casual workers;
- The particular impact of these agreement on low-income workers in regional areas where there is a limited pool of available work;
- The limited remedies available for employees to challenge these agreements under the common law restraint of trade doctrine, or the RTA in NSW;
- The jurisdictional limits of the Australian Competition and Consumer Commission (ACCC) under the *Competition and Consumer Act 2010* (Cth) (**CCA**) and the Competition Codes of the states to deal with agreements that relate to working conditions for employees and independent contractors; and
- The finding of a number of reviews into Australian competition policy and workplace relations that the negotiation and determination of employment terms and conditions are best dealt with under the FW Act.⁵⁸



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⁵⁷ *Issues Paper*, 38.

⁵⁸ *Issues Paper*, 35 nn 128.